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Supreme Court of the United States.

OCTOBER TERM, 1979.

No. **79-1962**

JOHN E. MURRAY, JR.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Supreme Court of the United States.

OCTOBER TERM, 1979.

No.

JOHN E. MURRAY, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner John E. Murray, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, which was entered in this case on May 15, 1980.

Opinions Below

The text of the opinion of the Court of Appeals in this case is reprinted at App. 1-14, hereto. The opinion is not yet reported in the Federal Reporter, 2d Series. The text of the judgment of the Court of Appeals is reprinted at App. 15, hereto. The trial in the United States District Court for the District of Massachusetts was by jury, and no opinion was filed by the District Court. The text of the judgment of the District Court is reprinted at App. 16, hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 22(2).

Questions Presented

I. Did The Court of Appeals Commit Error by (1) Holding, Contrary to All Prior Law, That Whether or Not an Article Has Undergone "Substantial Transformation," Which by Customs Regulation 19 C.F.R. § 134.1(b) Determines an Article's "Country of Origin," Depends Solely on Changes in the Article's Economic Value Rather Than in Its Physical Characteristics, and (2) by Retroactively Applying This Novel Interpretation of the Regulation so as to Affirm Petitioner's Conviction for Falsely Stating on Customs Forms that Holland, rather than China, was the "Country of Origin" of Certain Animal Glue?

II. In His Prosecution Under 18 U.S.C. § 542 for Importing Animal Glue by Means of False Statements That Its Country of Origin is Holland, Once the Government Has Presented Evidence That It Was Originally Produced in China, Does 19 C.F.R. § 134.1(b) Shift the Burden of Proof Onto Petitioner to Prove That the Glue Was "Substantially Transformed" in Holland, and Therefore That His Statements Were True?

Constitutional Provisions, Statutes and Administrative Regulation Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

All but the last of the following statutes and regulation are set out in the appendix, in pertinent parts, due to their length (App. 17-23, et. seq.):

18 U.S.C. § 2
18 U.S.C. § 371
18 U.S.C. § 542
18 U.S.C. § 551
Tariff Schedules of the United States, 19 U.S.C. § 1202
19 U.S.C. § 1304

Customs Regulations, 19 C.F.R. § 134.1(b):

"'Country of origin' means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part."

Statement of the Case

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First

Circuit, entered on May 15, 1980, affirming his conviction. The District Court had jurisdiction over the offenses described in 18 U.S.C. §§ 2, 371, 542, and 551.

Prior Proceedings

A twenty-two count indictment was returned against petitioner (see App. 4, n. 2, for the Court of Appeals' explanation of the indictment's history.) Count 1 alleged that Petitioner conspired with others to defraud the United States Customs Service, in violation of 18 U.S.C. § 371; to knowingly import Chinese animal glue into the United States by means of false statements, namely, that Holland was its country of origin, in violation of 18 U.S.C. § 542; and to knowingly conceal documents for the purpose of suppressing evidence of fraud against the Customs Service, in violation of 18 U.S.C. § 551. Counts 2-22 each charged that Petitioner willfully imported such glue into the United States by means of statements which were false and fraudulent in that they did not state the proper dutiable entered value and country of origin of the glue, in violation of § 542. Under Customs Regulation 19 C.F.R. § 134.1(b) ("the Regulation"), the term "country of origin" is defined as follows:

> "'Country of origin' means the country of manufacture, production, or growth of an article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part."

The Trial

After a trial by jury in the District Court, Petitioner was convicted upon all twenty-two counts of the indictment. Petitioner was sentenced to a term of two years, the first six months to be served in jail and the balance suspended

with probation for two years. Petitioner was also ordered to pay a fine of $20,000. Execution of sentence was stayed pending appeal.

At trial, there was evidence of the following:

Nicholson and Company, Inc. ("Nicholson") was an importer of animal glue with headquarters in Cambridge, Massachusetts. During the period 1972-1975, Petitioner was Nicholson's vice-president and chief executive officer. Petitioner's father, John Murray, Sr., was president of the company. Petitioner's nephew, indicted co-conspirator Stephen P. Hopkins, was also a vice-president. N.V. Lijmfabriek C. Trommelen ("the Trommelen Company") was a dealer and manufacturer of animal glue with headquarters in Dongen, Holland. The Trommelen Company's manager was co-conspirator Bas Trommelen.

At trial, the Government attempted to prove that Petitioner caused Nicholson to import animal glue into the United States from Holland, by means of two categories of false statements, i.e., falsely stating the glue's "country of origin" as Holland, rather than the Peoples Republic of China, and falsely stating its dutiable entered value by omitting therefrom certain payments which Nicholson made to Bas Trommelen individually.

The Government attempted to prove that Petitioner, Bas Trommelen, Hopkins, and others entered into a plan under which Nicholson bought Chinese glue in Europe from European brokers; purported to sell it to the Trommelen Company in Holland; arranged for the Trommelen Company to rebag the glue at its plant; arranged for the Trommelen Company to resell the glue to Nicholson at the same price, increased only by charges attributable to rebagging, trucking, and loss of interest on the money it had

paid to Nicholson; and imported the glue into the United States by stating on Customs Forms 5515 ("Special Customs Invoice") and 7501-B ("Consumption Entry") that its country of origin was Holland. (The Government also attempted to prove that Nicholson paid individual commissions to Bas Trommelen on this glue, and imported it by stating on the Customs forms its dutiable entered value as an amount excluding these payments.) The Government attempted to prove that Petitioner's purpose was to take advantage of the lower duty rates applicable to products of Holland, and avoid the higher duty rates applicable to those of China. The Court of Appeals, in its opinion, has set forth the evidence in greater detail, and Petitioner respectfully refers this Court to that opinion (App. 5-6).

The Government's evidence at trial consisted primarily of the testimony of Bas Trommelen, business records of Nicholson, and documents submitted to the Customs Service. The Government claimed, and its evidence tended to show, that nothing was done to the glue in Holland by the Trommelen Company other than rebagging, leaving unaltered its physical characteristics, and that it therefore was not "substantially transformed" in Holland within the meaning of the Regulation, so that its true "country of origin" was China. On the other hand, there was also evidence at trial which, if believed, tended to show that, in Holland, the Trommelen Company blended, ground, screened, and defoamed the raw, crude Chinese glue purchased by it from Nicholson (a processor's good), thereby changing its physical character so that it became a new product with a new use, a commercial adhesive (a consumer's good). Petitioner contended that the glue had therefore been "substantially transformed" (within the meaning of the Regulation) in Holland by the Trommelen Company, making Holland its

country of origin. (There was also evidence, if believed, tending to show that the payments to Bas Trommelen were made by Nicholson to obtain his services in securing the Trommelen Company as an exclusive source of supply for Nicholson during a period of world-wide glue shortage.)

As noted, Petitioner was convicted by a jury upon all twenty-two counts of the indictment. Hopkins was acquitted by the jury upon all twenty-two counts.

Proceedings on Appeal

On appeal, as at trial, the dispute between Petitioner and the Government centered on whether or not the Trommelen Company had "substantially transformed" the glue in Holland by changing its physical characteristics. Petitioner argued that the District Court committed four errors:

(1) By not dismissing the indictment, because the phrase "substantial transformation" in the Regulation is void for vagueness, in that it does not adequately define what changes in the physical identity of animal glue are sufficient to make the countr of processing its "country of origin." The Government argued that, as applied to physical changes in animal glue, the language passes Constitutional muster.

(2) By failing to define the term "substantial transformation" in its instructions to the jury. Petitioner claimed that the District Court should have adopted his requests of charge (which were, in effect, that the jury must determine whether the animal glue, by virtue of work performed on it in Holland, had been altered physically so that it became a new product with a new use). The Government argued that the District Court adequately conveyed to the jury the level of required physical change.

(3) By improperly restricting Petitioner's cross-examination of the key prosecution witness, Bas Trommelen. Petitioner argued that his Sixth Amendment rights had been violated because the District Court did not allow him to question Trommelen with respect to whether or not some of the Chinese animal glue purchased by the Trommelen Company from Nicholson had been re-exported by it to non-European Economic Community nations, contrary both to Trommelen's representations on Dutch Customs forms (by which he obtained duty "drawbacks" on the glue) and to Dutch law. Petitioner argued that he was prejudiced because the District Court prevented him from establishing the present financial motive of the key prosecution witness to lie concerning the crucial issue of "substantial transformation." Petitioner argued that the Court's ruling also prevented him from establishing that, because some of the Chinese glue had been re-exported, the Trommelen Company necessarily blended Dutch glue with the Chinese glue in order to meet its poundage commitments to Nicholson, thereby substantially transforming it. The Government argued that the District Court properly exercised its discretion.

(4) By denying Petitioner's motions for judgment of acquittal as to the Government's alternative theory of false statements, because the fact that the payments to Bas Trommelen individually never inured in any way to the Trommelen Company meant that they were not part of the glue's dutiable value. The Government argued that such payments were dutiable.

The Court of Appeals dealt only with point (1). In doing so, it ignored the contentions repeatedly argued by both sides at trial, in their briefs, and in oral argument, viz., whether "substantial transformation" is unconstitutionally

vague as a definition of those changes in an article's *physical* characteristics which determine its "country of origin." Instead, the Court held, for the first time, that the Regulation requires a change in the article's *economic value,* not its physical character, and that this change, effected by labor performed on it, must be "significant." (App. 9-10). The Court therefore held that "substantial transformation," so construed, was not unconstitutionally vague. (App. 12). Holding further that the Regulation imposed the burden on Petitioner to prove, in his trial for falsely stating the "country of origin" as Holland, that the glue had been "substantially transformed" in Holland (App. 12, n. 7), the Court found that Petitioner had not met his burden. It stated that the District Court should have instructed the jury that, if it found the glue was "originally manufactured" in China, Petitioner's statements as to "country of origin" were false (App. 13). Having so interpreted the Regulation, the Court held that it need not reach Petitioner's argument concerning the jury instructions (App. 13). The Court of Appeals also held that, since Petitioner did not claim that he wished to cross-examine Bas Trommelen as to what *economic value* was added to the glue in Holland, his Sixth Amendment argument must fail (App. 13); and, finally, that, since the indictment was framed to charge false statements concerning "country of origin" conjunctively with false statements concerning dutiable value, the Court need not consider Petitioner's argument on the latter (App. 14).

Petitioner's argument to this Court is that the Court of Appeals decided the "substantial transformation" question on wholly novel — and erroneous — grounds, causing it likewise erroneously to resolve the Sixth Amendment issue, and erroneously to refuse to deal with the issues as to

jury instructions and motions for acquittal. The reasons why this Court should review the Court of Appeals' judgment in resolving the "substantial transformation" issue wholly on economic grounds are set forth below.

Reasons for Granting the Writ

I A. By Misconstruing the Meaning of the Phrase "Substantial Transformation" in the Regulation, the Court of Appeals has Decided an Important Question of Federal Law in a Manner which Conflicts with Prior Decisions of this Court, of the Court of Customs and Patent Appeals, of the Customs Court, and of the United States Customs Service. Its Decision is Likely to Cause Serious Practical Consequences in the Daily Administration of the United States Customs Laws.

The Court of Appeals held that the term in the Regulation "substantial transformation", defining what level of manufacturing processes determine an article's "country of origin," ". . . is to be measured with reference to economic value, and the degree must be very great" (App. 9). The Court, relying on the Regulation's intended purpose to implement the Tariff Act and Schedules (App. 7), held that "substantial transformation" does *not* concern physical changes which result from added labor — apparently, no matter how drastic such changes might be (App. 13). The Court of Appeal's holding that change in economic value is the sole determinant of "substantial transformation" conflicts with all relevant authority, including decisions by this Court, to the effect that, where work performed on an article effects a statutorily significant change under the Tariff Act, the proper inquiry is whether the article has been changed with respect to its *physical* char-

acteristics and its function. Most often, this inquiry is expressed in terms of whether processing has resulted in a product with a new name, character, or use.

Decisions determining the adequacy of marking of "country of origin" pursuant to 19 U.S.C. § 1304 have long held that the concept of "substantial transformation" is concerned with changes in an article's physical characteristics. See *Parodi Erminio & Co. v. United States,* 6 Cust. Ct. 288, 290, C.D. 485 (1941); C.S.D. 79-349, 13 Customs Bull., Oct. 31, 1979 at p. 21; 61 Treas. Dec. 873, T.D. 45611(19) (1932); 61 Treas. Dec. 919, T.D. 45623(2) (1932); 68 Treas. Dec. 428, T.D. 47946(6) (1935); 70 Treas. Dec. 235, T.D. 48493(5) (1936); 95 Treas. Dec. 214, T.D. 55108(2) (1960); *A.S. Beck Shoe Corp. v. United States,* 70 Treas. Dec. 1009, 1010-1011, T.D. 48724 (Cust. Ct. 1936); *William Camp Co. v. United States,* 70 Treas. Dec. 611, 614, T.D. 48623 (C.C.P.A. 1936). See also T.D. 78-202, 12 Customs Bull., July 12, 1978 at pp. 4-7, questioning the applicability of "substantial transformation" to determinations of duty rate, but holding that, in any event, the operative inquiry is whether a "new and different article with a distinctive name, character, or use" results.

Administrative decisions interpreting "substantial transformation," as applied to the Generalized System of Preferences, also show that physical changes are dispositive. T.D. 78-418, 12 Customs Bull., Nov. 22, 1978 at p. 11; C.S.D. 79-312, 13 Customs Bull., Sept. 12, 1979 at p. 36.

To the same effect are cases determining whether an importer has sufficiently processed an imported article such that he is its "ultimate purchaser," thereby permitting eradication of its "country of origin" markings. *United*

States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267, 273, C.A.D. 98 (1940); *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 507, C.D. 4026 (1970).

Cases determining whether a product has been sufficiently processed in a non-communist country so as to remove it from the coverage of 86 Treas. Dec. 300, T.D. 52788 (1951), entitling it to a lower duty rate, also turn on whether labor added to the product has sufficiently changed its physical characteristics. *Chemo Puro Manufacturing Corp. v. United States*, 34 Cust. Ct. 8, 11, C.D. 1668 (1954); *F.W. Myers & Co., Inc. v. United States*, 36 Cust. Ct. 5, 5-6, C.D. 1745 (1955).

See also those decisions determining whether an article has been "manufactured" in the United States prior to re-export, within the meaning of the drawback statute, 19 U.S.C. § 1313(a) and its predecessors, *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556, 562 (1908); *United States v. International Paint Co., Inc*, 35 C.C.P.A. 87, 93-94, C.A.D. 376 (1948); *United States v. Samuel Dunkel & Co., Inc.*, 33 C.C.P.A. 60, 63, 65, C.A.D. 317 (1945); and see those decisions determining whether an article has been "manufactured" so as to place it within one classification rather than another under the Tariff Schedules, *Hartranft v. Wiegmann*, 121 U.S. 609, 615 (1887); *Ishimitsu v. United States*, 11 Ct. Cust. App. 186, 191, T.D. 38963 (1921). See also, *Lawrence v. Allen*, 48 U.S. (7 Howard) 785, 793-794 (1849).

All these decisions cited above have two things in common: In all, the focus is clearly on *physical* changes resulting from the added work. And in none is there any indication that the determinative inquiry is whether the added work has effected a change in the article's economic value.

To Petitioner's knowledge, the Court of Appeals' decision is the first time that such a standard has been imposed or even suggested. As the above-cited decisions and rulings show, the Regulation's "declared purpose", relied on by the Court (App. 7), does not support its conclusion that "substantial transformation" is to be equated with an increase in economic value. It follows that the Court's opinion is reduced to reliance on a sixth usage of the word "substantial," as defined in one general purpose dictionary (App. 9). This is insufficient authority for rejecting long-standing and consistent precedent. The Court's conclusion makes the fundamentally unsound assumption that change in an article's economic value is necessarily, and directly, correlated to labor performed on it. Such an analysis ignores the many *extrinsic* factors which can affect value, such as economic conditions in the country of processing, changes in demand, changes in fashion, availability and cost of transport, and currency differentials. The Court's opinion thus misconstrues the connection between labor and change which is implicit in the Regulation's language.

The Court of Appeals' misreading of "substantial transformation" is a drastic alteration of a fundamental concept of Customs law which is likely to have serious practical consequences. Currently, imported articles must be clearly marked with their "country of origin," under 19 U.S.C. § 1304(a) (the only exceptions being those articles exempted pursuant to that provision). Moreover, Customs Forms, which must be submitted by importers to the Customs Service upon entry of merchandise, require an importer to state thereon, and certify as true, the "country of origin" as defined by "substantial transformation". The Court of Appeals' holding not only changes the ground rules under which these activities have taken place, but it does so with

dangerous inexactness, couched in terms like "significant" and "very great" increases in economic value. The Court of Appeals has left it to appraisers and importers to resolve, unaided, how much is "significant;" when changes in economic value are measured; how they are measured (e.g., to what extent, and how, must an importer or appraiser try to separate economic value attributable to "labor" from that attributable to other factors?) The Court's decision virtually guarantees serious disagreements between Customs appraisers and importers as to the correctness of markings and statements of "country of origin." The net result can only be unwarranted penalty proceedings and, ultimately, review in the federal courts under 19 U.S.C. § 1592, as amended.

Moreover, the new standard devised by the Court of Appeals imposes an unacceptable burden on importers who, after all, are *required* to make statements as to "country of origin." Its subjects them unnecessarily, and unfairly, to fear of civil penalties or forfeiture, and of criminal prosecution. As a consequence, importers are more likely to adopt what now becomes the only safe course — to seek advance rulings on their countless importations, unnecessarily diverting their attention and that of the Customs Service from other business.

Moreover, the Court's decision may amount to judicial alteration of the duty rates applicable to some products, imposing a serious financial burden on importers. Particularly affected would be those products a large percentage of the value of which is attributable to raw material, but whose physical identity is totally altered by inexpensive foreign labor. This is an economic burden not countenanced until now. It is equally likely to produce disagreement between appraisers and importers, leading to needless protest

actions in the Customs Court seeking resolution anew of what was, until now, a settled issue. Petitioner submits that a complete departure from prior law which will have these, and perhaps other unforeseeable, administrative, judicial, and economic consequences, is a proper subject for review by this Court.

I B. The Court of Appeals' Decision, Disregarding Prior Authority and Retroactively Applying Its Unforeseeable Interpretation of "Substantial Transformation" so as to Affirm Petitioner's Conviction, Conflicts in Principle with Decisions of this Court, and so far Departs from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

The Court of Appeals' holding that economic, not physical, changes in a product determine its country of origin is an unforeseeable and unexpected judicial construction in light of all prior law. (Indeed, the words "substantial transformation," standing alone, lend themselves far more readily to the concept of physical change than to that of change in economic value.) As such, the Court's retroactive application of its construction to Petitioner in this criminal prosecution violates his Fifth Amendment due process rights and conflicts in principle with this Court's decisions in *Marks v. United States,* 430 U.S. 188 (1977) and *Bouie v. Columbia,* 378 U.S. 347 (1964). Although *Bouie* involved a state court's statutory construction which was unexpected in light of the statute's "narrow and precise" language, 378 U.S. at 351, its holding was meant to govern retroactively-applied decisions unforeseeable in light of prior judicial interpretations as well — "If a judicial construction of a criminal statute is unexpected and indefensible by

reference to the *law* which had been *expressed* prior to the conduct in issue, it must not be given retroactive effect," 378 U.S. at 354, quoting Hall, General Principles of Criminal Law (2d ed. 1960) [emphasis added]. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 678-680 (1930), cited approvingly in *Bouie* at 378 U.S. 354. *Marks* made it plain that, where statutory language has been construed by a court, due process precludes retroactive application of a subsequent unforeseeable construction to a defendant in a criminal case. 430 U.S. at 195. The fact that *Marks* involved a statute restricting First Amendment rights, 430 U.S. at 196, does not distinguish it since *Marks* clearly turned on due process grounds, 430 U.S. at 191-192. See also *James v. United States,* 366 U.S. 213, 221-222 (1961). The Court of Appeals itself unintentionally noted the effects of its unforeseeable ruling on Petitioner's due process rights. Thus, (even beyond the fact that Petitioner could have had no warning of this construction at the time of his conduct), the Court pointed out that, at trial, Petitioner introduced ". . . no evidence that while [the glue] was in Holland the glue had increased in value by any particular percentage or amount, . . ." (App. 12), and that Petitioner "did not claim at the trial court or here that he wished to cross-examine the witness on the vital question as to what economic value was added to the glue . . ." (App. 13). Had Petitioner sought to do so, however, he might properly have been precluded by the District Court because the law, until retroactively changed by the Court of Appeals, was that physical, not economic, change governed.

The Fifth Amendment due process interests affected by this unforeseeable alteration of governing law are particularly important here, a case which involves the novel use of 19 C.F.R. § 134.1(b) as the basis for a criminal prosecu-

tion under § 542. "[P]ioneering interpretations of the [customs] law should not be sought or rendered in criminal prosecutions . . . but rather in civil suits . . .," see *United States v. Critzer,* 498 F.2d 1160, 1163 (4th Cir. 1974).

I. C. The Court of Appeals, by Refusing to Defer to Rulings of the Customs Service Interpreting "Substantial Transformation" in the Context of "Country of Origin," is in Conflict with an Applicable Decision of this Court.

The Court of Appeals noted that Customs Service Rulings "may not be consistent with our interpretation of the subterm 'substantial information [sic] . . .'" (App. 10) but held that it was not obligated to defer to such rulings. Petitioner submits that a long series of published rulings by the Customs Service clearly have turned on the issue of physical change. They are not plainly erroneous or inconsistent with the Regulation. As the agency's construction of a relevant statute, they would be entitled to "great deference," *Udall v. Tallman,* 380 U.S. 1, 16 (1965). As its construction of regulatory language wholly of its own design, "deference is even more clearly in order." *Ibid.,* at 16-17. The Court of Appeals' ruling not only conflicts with *Udall,* but jeopardizes the significant interests which importers have in relying upon prior determinations by the Customs Service, and sanctions unwarranted interference by the federal courts in its daily administration of the Customs laws.

II. By Imposing on Petitioner, in His Prosecution for Making False Statements, the Burden of Proving that His Statements as to Country of Origin were True, the Court of Appeals has Decided an Important Question of Federal Law in a way Which Conflicts with Applicable Decisions of this Court.

This Court has squarely held that ". . . the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977). See *In Re Winship*, 397 U.S. 358, 375 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). Petitioner was charged with violations of 18 U.S.C. § 542. One of the required elements of the crime defined in that statute is that Petitioner made statements which were false. See *United States v. Piascik*, 559 F.2d 545, 551, (9th Cir. 1977) *cert. den.* 434 U.S. 1062 (1978). Couched in terms of § 542 and the indictment, therefore, this Court's decisions require the Government to prove beyond a reasonable doubt that China was the country of origin of the glue, and not Holland. Indeed, this was acknowledge by the Court of Appeals in its opinion (App. 12, n. 7). But that Court, relying on the language in the Regulation, held that the Government, by showing that the glue was originally manufactured in China, shifts the burden of proof to Petitioner with respect to this issue:

> "The Government has borne the burden of going forward when it has shown that the glue was manufactured in China. When defendant claims that his glue falls within the exception because in Holland it underwent 'substantial transformation,' he has the burden of *proving* such 'substantial transformation' because in effect he is alleging that the glue comes within an exception."
>
> App. 12, n. 7. [emphasis added]

In no sense does this language create an "affirmative defense," "an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of punishment . . .," *Patterson, supra*, at 207, 210, nor did the Court

of Appeals so read it. Instead, the Court required Petitioner to prove "the critical fact in dispute," *i.e.*, that the glue had undergone a "substantial transformation" in Holland. This burden-shifting deprived Petitioner of his due process rights, in direct conflict with decisions of this Court, *Mullaney, supra,* at 701.[1/]

Conclusion

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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[1/] A strained reading of the Court of Appeals' opinion, relying solely on its statement that Petitioner produced "no evidence" (App. 12) of change in economic value, might permit the conclusion that it created a mandatory presumption shifting only the burden of producing evidence, not of proof. This, of course, ignores the Court's express language (App. 12, n. 7). Even if so read, however, its holding raises a significant question of Fifth Amendment due process rights which ought to be settled by this Court. See this Court's characterization of such a presumption as "a far more troublesome evidentiary device, . . ." *Ulster County Court v. Allen,* 442 U.S. 140, 157 (1979) (a case sustaining a "permissive" presumption.) See also *Leary v. United States,* 395 U.S. 6, 36, n. 64 (1969). The question calls particularly for this Court's resolution since any mandatory presumption involved here derives from an administrative regulation which contains not the least indication that it is intended to govern the admission or weight of evidence in criminal cases in the federal courts, see *United States v. Mersky,* 361 U.S. 431, 441 (1960), even if it properly *could* do so.

SUPREME COURT, U.S.
FILED
JUN. 13 1980
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. **79-1962**

JOHN E. MURRAY, JR.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

Appendix to the Petition for a Writ of Certiorari.

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United States Court of Appeals
For the First Circuit

No. 79-1477

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOHN E. MURRAY, JR.,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOHN J. MCNAUGHT, *U. S. District Judge*]

Before COFFIN, *Chief Judge,*
BOWNES, *Circuit Judge,*
WYZANSKI, *Senior District Judge.**

Steven J. Brooks, with whom *John Foskett,* and *Glass & Brooks* were on brief for appellant.

Kevin J. O'Dea, Assistant United States Attorney, with whom *Edward F. Harrington,* United States Attorney, was on brief, for appellee.

May 15, 1980

WYZANSKI, *Senior District Judge:*

Defendant John Murray, Jr. was convicted, after a jury trial, upon one count charging him with conspiracy in violation of 18 U.S.C. §371 and upon twenty-one counts charging him with having willfully and knowingly introduced into the United States imported glue by means of false statements in violation of 18 U.S.C. §542. The district judge imposed a sentence of 2 years—6 months to be served, the balance to be suspended—and a fine of $20,000.

On his appeal to this court defendant states that the issues are (1) whether the sub-term "substantial transformation" used in

*Of the District of Massachusetts, sitting by designation.

19 C.F.R §134.1(b) is "unconstitutionally vague," (2) whether the district judge in his instructions to the jury adequately defined that sub-term, (3) whether the district judge erroneously refused to permit cross-examination of a government witness as to his motives, and (4) whether the district judge erroneously denied defendant's motion for acquittal.

The gist[1] of the allegations of count 1 is that, in violation of

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[1]Count 1 of the indictment after identifying Nicholson and Co., Inc., the defendant John Murray, Jr., the defendant Stephen Hopkins, the defendant Bas Trommelen, and John Murray, Sr. makes in paragraphs 6, 7, and 8 the following allegations:

"6. From on or about February, 1972, and continuously thereafter through on or about January, 1975, the exact dates being to the Grand Jury unknown, at Boston and Cambridge, in the Commonwealth and District of Massachusetts and elsewhere outside said District, the defendants,

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with each other and another person or persons to the Grand Jury both known and unknown did knowingly, willfully and unlawfully combine, conspire, confederate and agree together, and with each other, 1) to defraud the United States Customs Service of and concerning its governmental functions and rights, by obstructing and defeating the Customs Service of the United States in its lawful governmental function of efficiently administering the Customs laws of the United States, more particularly the administration of imported merchandise into the United States, free from dishonesty and deceit in violation of Title 18, United States Code, Section 371; 2) to knowingly and intentionally enter and introduce and cause to have entered and introduced into the commerce of the United States merchandise by means of fraudulent and false documents and statements, made and cause to be made false statements in declarations without reasonable cause to believe the truth of such statements and procure and cause to be procured the making of false statements to material matter, to wit, the proper dutiable value and country of origin of said merchandise without reasonable cause to believe the truth of such statements in order to avoid paying the lawful duties and taxes thereon; in violation of Title 18, United States Code, Section 542; and 3) to knowingly and willfully conceal and destroy and cause to have concealed and destroyed invoices and papers relating to said imported merchandise for the purpose of suppressing evidence of fraud against the United States Customs Service in violation of Title 18, United States Code, Section 551.

7. It was part of the conspiracy that the defendants, in matters within the jurisdiction of the United States Customs Service, and its

18 U.S.C. §371, defendant Murray and others conspired (1) to defraud the United States Customs Service by obstructing it in its lawful function of efficiently administering the customs laws, in violation of 18 U.S.C. §371, (2) to knowingly and intentionally cause to be entered into the commerce of the United States merchandise by means of false statements, in violation of 18 U.S.C. §542, and (3) to knowingly and willfully conceal and destroy papers relating to said merchandise for the purpose of suppressing evidence of fraud against the United States Customs Service, in violation of 18 U.S.C. §551. The count also alleges that in furtherance of this single conspiracy Murray and the other conspirators caused the commission of thirty overt acts.

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agents, to wit, the assessment of tax and duties due on imported merchandise entered and introduced into the commerce of the United States, would make and cause to be made false statements in declarations, invoices and documents to the United States Customs Service and its agents and conceal from the said Customs Service and its agents the true facts concerning the country of origin of imported glue, its value and commissions paid thereon in order to prevent the true assessment of tax and duties due thereon.

8. It was further a part of the conspiracy that the defendants would knowingly and intentionally destroy and conceal from the United States Customs Service invoices and papers relating to glue imported into the United States in order to perpetuate their scheme to defraud the United States Customs Service and its agents of properly assessing the taxes and duties on said glue."

Following paragraph 8, count 1 recites thirty overt acts.

Counts 2 through 22[2] each charged that on a specified day defendant Murray and others did willfully enter glue into the commerce of the United States by means of false statements and by false and fraudulent invoices and declarations. Inasmuch as, except for dates and numbers, counts 2 through 22 were identical, it will suffice if we quote count 2 in the margin.[3]

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[2]The grand jury returned an indictment in 38 counts. Before the trial began the district judge, upon the government's motion, dismissed 16 counts. He seems to have directed that there should be prepared and given to the petit jury a new paper, a so-called indictment, showing the 22 remaining counts with each of them, except count 1, having a new number but otherwise unchanged. For example, count 3 was re-numbered 2. No doubt, the district judge's procedure simplified presentation of the case and kept from the jury knowledge of dismissed counts which might have prejudiced Murray and other defendants. Inasmuch as no one objected to this procedure, we shall assume that the district judge exercised a permissible discretion and we shall refer to the counts by their new numbers.

[3]Count 2 alleges:

"1. The Grand Jury hereby realleges and incorporates by reference as if set forth in full herein Paragraphs 1 through 5 of Count I.

2. On or about November 14, 1973, the exact date being to the Grand Jury unknown, at Boston and Cambridge, in the district and Commonwealth of Massachusetts and elsewhere outside said District, the defendants,

STEPHEN HOPKINS
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and another person or persons to the Grand Jury both known and unknown, acting in concert and in furtherance of and as part of the conspiracy and plan charged in Count I of this indictment, did willfully and knowingly enter and introduce in the commerce of the United States imported merchandise, that is, glue by means of false statements and by means of false and fraudulent invoices, declarations, affidavits, and certain other paper, to wit, Special Customs Invoice and Customs Consumption Entry No. 118169, which said documents were false and fraudulent in that they did not reflect the proper dutiable entered value and country of origin of said merchandise.

In violation of Title 18 United States Code Section 542 and 2."

The evidence, viewed as it should be when the issue is whether the evidence is sufficient to support a conviction, (see *Ingram* v. *United States,* 360 U.S. 672, 678 (1959); *United States* v. *Zozlio,* No. 79-1354, slip op. at 3 (1st Cir. Mar. 18, 1980); and *United States* v. *Indelicato,* No. 79-1068, slip op. at 13 (1st Cir. Nov. 20, 1979) in the light most favorable to the government, was to the following effect.

Nicholson and Company (hereinafter "Nicholson") of Cambridge, Massachusetts is an importer of animal glue. During 1972-1975 defendant John Murray, Jr. was its vice president and chief executive officer; John Murray, Sr., an elderly, ill man, was its president; and Stephen Hopkins was a vice president who was in charge of daily operations when defendant was absent.

N. V. Lijmfabriek C. Trommelen (hereinafter "Trommelen") of Dongen, Holland was a dealer and manufacturer of glue. Trommelen's chief operating officer was Bas Trommelen.

Defendant in May, 1972 agreed with his father, Hopkins, and Bas Trommelen upon a plan for Nicholson to purchase Chinese glue abroad from English and German brokers, to have that glue shipped to Trommelen at Rotterdam, and to have Trommelen take that glue to its Dutch factory to rebag the glue, and to re-export it as though it were made in Holland and as though it were sold by Trommelen to Nicholson.

In carrying out the scheme, Nicholson prepared in Cambridge purchase orders for Chinese glue and sent them to English and German glue brokers outside the United States. Those foreign brokers bought the glue in China and shipped it to Rotterdam. From there Trommelen trucked the glue to its factory in Dongen, Holland where Trommelen rebagged the glue. After the glue arrived in Rotterdam, Nicholson purported to sell the glue to Trommelen for prices lower than Nicholson paid its English and German brokers. After Trommelen had rebagged the glue, Trommelen purported to re-sell it to Nicholson for the same price Trommelen had originally paid Nicholson, plus charges for (1) the trucking in Holland, (2) the rebagging at Trommelen's factory, and (3) Trommelen's loss of interest on the money it paid Nicholson which Nicholson later repaid Trommelen.

Nicholson paid to Bas Trommelen individually for his part in the transactions a special commission on each shipment of glue.

When Trommelen's shipment of glue to Nicholson reached the United States Nicholson, through its custom broker, presented to the United States Customs Service the documents showing the purchases of glue from Trommelen, and filled in and delivered to the Service its Form 5515, "Special Customs Invoice" and its Form 7501-B, "Consumption Entry,"[4] so as to show that (1) Holland was "the Country of Origin" of the merchandise and (2) the "Entered Value in United States Dollars" was an amount based upon the price which Nicholson paid Trommelen on the resale of the glue by Trommelen to Nicholson, but not taking into account the special commission which Nicholson paid Trommelen individually for his part in the preceding transaction.

With an intent to defraud the Customs Service, Nicholson concealed from the Service all documents or other information with respect to its purchases in China through its English and German brokers of the very glue which it was importing.

Defendant Murray personally directed or participated in all of the above acts of Nicholson, its custom brokers, and its other agents.

When defendant Murray became concerned that the Customs Service was on the trail of the fraudulent scheme with respect to the glue he sent to Bas Trommelen this message:

> "Whatever needs to be done to defend yourself against whatever charges Customs may make, we advise you to do, even if it means preparing a set of duplicate books or whatever."

Responding to defendant Murray's statement of the issues he seeks to raise on this appeal, we first consider whether, as applied to the facts in this case, the definition of "Country of Origin" set forth in 19 C.F.R. §134.1(b) was vague.

So far as relevant, 19 C.F.R. §134 provided:

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[4]No one transmitted those custom forms to the court of appeals, and they are not quoted in the briefs or the appendix. We, however, have examined in the district court those exhibits.

§134.0 *Scope.*

This part sets forth regulations implementing the country of origin marking requirements and exceptions of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), together with certain marking provisions of the Tariff Schedules of the United States (19 U.S.C. 1202). It also contains provisions regarding false or misleading markings as to the country of origin. The consequences and procedures to be followed when articles are not legally marked are also set forth. Special marking and labeling requirements are covered elsewhere.

§134.1*Definitions.*

When used in this part, the following terms shall have the meaning indicated:

(b) *Country of origin.* "Country of origin" means the country of manufacture, production, or growth of any article of foreign origin entering the United States. *Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin"* within the meaning of this part. [Emphasis added]

We perceive nothing vague in the sub-term "substantial transformation" as used in the 19 C.F.R. §134.1(b) definition of the basic term "country of origin," and as applied to the facts in this case. Our analysis of that basic term and the sub-term follow.[6]

The term "country of origin" and the sub-term "substantial transformation" appear in a regulation which has the declared purpose of "implementing. . . the Tariff Act of 1930 as amended (19 U.S.C. [§]1304) and the Tariff Schedules of the United States (19 U.S.C. [§]1202)." That act and those schedules impose a duty on each imported article at a rate determined according to the article's "country of origin." Were there no definition of that basic term it would be clear enough; the term would have its ordinary meaning; it would mean the country where the first manufacture, production, or growth of an imported article oc-

curred; it would leave aside as totally irrelevant any subsequent country where the article had been processed or from which it had been exported to the United States. One purpose of the definition set forth in 19 C.F.R. 134.1(b) is, as the opening sentence of that sub-section reveals, to retain that ordinary meaning of "country of origin" as being in the generality of cases the appropriate key to the applicable rate set forth in the tariff schedules.

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[5]It must not be overlooked that the sub-term is part of a definition of the basic term "country of origin." There is a point beyond which it is not practical to continue the process of sub-definition. Certainly the sub-definition need not be reduced to the few words which Professor I. A. Richards thought were "Basic English."

In the case of a customs, tax, penal, or otherwise coercive statute or regulation a definition needs to be only sufficiently clear adequately to inform the person subjected to a command what obligation is imposed upon him by the statute or regulation.

In the case of a judge's instructions to the jury, it is unnecessary for the judge to define a sub-term in an administrative regulation's definition of a statutory basic term unless the sub-term is so opaque or obscure that its meaning would not be clear to a juror of common education and common sense. The mere fact that a term in a statute or regulation is sufficiently clear so that the person to whom it is addressed can understand it and be punished for violating that law does not automatically prove that the term is also clear to a juror; although the converse is true. That is, any term which is clear to the average juror would not be held to be too vague to serve as the basis of a punishment.

Our analysis in the main body of the opinion of the sub-term "substantial transformation" is directed at demonstrating that the sub-term would be clear to an importer, like the defendant, under statutory commands to give to the United States Customs Service information about an imported article and to make payment of a customs duty imposed on such an article.

It will appear later in the opinion that we need not decide whether the sub-term "substantial transformation" without further definition by a judge, would be clear to a jury.

[6]Being mindful that the interpretation of terms in a regulation or statute should take into account their context, we address ourselves first to the relevant statutes and regulations and then to the etymology of the two words in the term "substantial transformation."

Another purpose of the definition is, as the closing sentence of that sub-section reveals, to cover the exceptional cases where "work or material [has been] added to an [imported] article in another country." The closing sentence of the sub-section is necessarily premised on the proposition that in the case of some, but not all, imports originating in one country and processed in a second country, it would be appropriate to make applicable the rate of the second country. Without expressly so stating, the regulation has the obvious purpose of making applicable the second country's rate when and only when the contribution of the second country to the value of the imported article was of great significance compared to the contribution of the first country. We can discern no other possible rational purpose for the otherwise totally unnecessary sub-section.

The sub-section of the regulation proceeds suitably to implement that last purpose by the use of the sub-term "substantial transformation" in the closing sentence of 19 C.F.R. §134.1(b).

"Substantial transformation," while not a term or sub-term in common use, is composed of two words in common use. "Transformation," whether or not modified by an adjective, means a *fundamental* change, not a mere alteration, in the form, appearance, nature, or character of an article. As is indicated by its first syllable, it means a change which carries an article or other object *across* from one class to another class. When used to aid in the determination of the appropriate rate of duty under a tariff schedule it means such a change as to move the article either from one to another of the classes established by official tariff schedules, or from one to another of the classes of goods, wares, and merchandise commonly recognized in the commercial markets where such articles are traded. As a modifier of "transformation," "substantial" means more than "fundamental" because if that were its only meaning it would be redundant; it means a very great change in the articles's "real worth, value." See Random House Dictionary (1967), p. 1418, "substantial," 6th meaning. Hence as part of a sub-term in a definition of a basic term used as a key to rates in tariff schedules, "substantial" has an *economic* meaning. The adjective "substantial" informs us that the degree of change is to be measured with reference to economic value, and the degree must be very great.

When read, as it should be, as a unified expression, not as two separate words, and when read in the light of the purpose of the closing clause of sub-section (b) of 19 C.F.R. §134.1, we hold that the sub-term "substantial transformation" means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown.

That meaning of the sub-term "substantial transformation" not merely is in accord with the purpose of the closing sentence of 19 C.F.R. §134.1(b), and in accord with common usage of each of the two words which together compose the sub-term, but also is the one which would naturally occur to a person of common education and common sense who realized, as he should from reading the whole of 19 C.F.R. §134.1(b), that the general rule was to treat the country where an article was produced as the "country of origin" in determining the applicable tariff rate, and that the use of the rate of another country where the article was later processed could be proper only in the exceptional case where it was fairer to both the United States and the importer to take the rate of the second country. Proof of this last proposition lies in an hypothetical case. Suppose that at a time, like the present, when the tariff rate favors Holland over China, an article was produced in Holland and later processed in China in ways which did not substantially add to its value. No importer of the article from China and no customs official would be likely to read 19 C.F.R. §134.1(b) as making the Chinese rate applicable to that hypothetical case.

Some of the rulings by the Customs Service to which the defendant's brief calls our attention may not be consistent with our interpretation of the sub-term "substantial information."

We feel no obligation to defer or give much weight to those administrative rulings which are not supported by reasoning, which are "unprincipled," and which Judge Learned Hand would have analogized to decisions by a Kadi at the gate. This is not

a situation in which the agency entrusted by Congress with the task of applying a statute has adopted a view which not only reflects a greater familiarity than ours with the intricacies of the statute, but also embodies a principle or rationale which is applicable beyond the particular case in hand. Cf., *e.g., Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933); *Edwards' Lessee* v *Darby,* 25 U.S. (12 Wheat.) 206, 210 (1827); *Chapman* v. *Commissioner of Internal Revenue,* No. 79-1336, slip op. at 25 (1st Cir., Mar. 31, 1980); 2 K Davis, Administrative Law Treatise §7:14 (2d ed. 1979).

Nor is there any evidence that the defendant or those with whom he was associated relied upon any rulings of the Customs Service when they made statements or acted with respect to the glue here involved.

We now examine the evidence in this case, viewed most favorably to defendant. Here we examine the evidence from defendant's view because what we are about to decide is whether there was enough evidence for the judge to submit to the jury for its decision the question whether the change in the glue effectuated in Holland was sufficient to constitute a "substantial transformation." Cf. *Capp Homes v. Duarte,* No. 79-1348, slip op. at 1 (1st Cir., Mar. 31 ,1980). We are not now considering whether the defendant's conviction should be sustained because the jury was justified in rejecting the defendant's view of the evidence and instead accepting the government's view of the evidence—to wit, that nothing more than rebagging of the glue occurred in Holland.

On the view of the evidence favorable to defendant, Trommelen blended the Chinese glue with other glues to achieve uniform and proper bloomgram strength and other properties, screened the glue to remove the gross impurities, ground the glue to achieve a uniform and higher quality mesh size, and added a defoamer to obtain proper foam content—the effect of all this processing being to transform the glue from processors' goods to end-users' goods.

We conclude that even if we accept defendant's view of the evidence, that evidence was as *a matter of law* insufficient to show[7] that there had been in Holland a "substantial transformation" of the glue.

Our reasons for that conclusion are that there was no evidence that while it was in Holland the glue had increased in value by any particular percentage or amount, except by the cost of the rebagging; and that the uncontradicted evidence showed that after the glue had been in its factory Trommelen resold the glue for the same price it paid for it, plus the costs of rebagging, cartage, and interest.

The upshot of the matter is that "examined in the light of the facts of the case at hand,"[8] (1) there was no vagueness[9] in the 19 C.F.R. §134.1(b) definition of "country of origin," (2) there was not sufficient evidence that the glue had undergone a "substantial transformation" in Holland for the trial judge to have submitted to the jury the question whether it was the country

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[7]When the issue is whether defendant made a false statement, the government, because it has the burden of proving falsity, has also the burden of proving what would be a true statement of the glue's country of origin. The government has borne the burden of going forward when it has shown that the glue was manufactured in China. When defendant claims that his glue falls within the exception because in Holland it underwent "substantial transformation," he has the burden of proving such "substantial transformation" because in effect he is alleging that the glue comes within an exception.

[8]The phrase "the facts of the case in hand" comes from the statement in *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975), repeated in *United States* v. *Powell*, 423 U.S. 87, 92 (1975), that "It is well established that vagueness challenges to statutes [or regulations] which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand."

Where, as here, the questions are whether as a matter of law a regulation was vague and whether the trial judge correctly instructed the jury, "the facts of the case at hand" means the evidence viewed most favorably to the defendant.

[9]We need not and do not consider whether the standard of vagueness is different when the question is whether a person claims that the exception to a rule is vague from the standard of vagueness when the question is whether the main thrust of the rule is vague.

of origin; and (3) the district judge should have instructed the jury as a matter of law that if it found that the glue had been originally manufactured in China, a statement that Holland was the country of origin was false.

It follows that the defendant's first point (with respect to vagueness) has no merit; and his second point (with respect to allegedly inadequate instructions as to the meaning of the subterm "substantial transformation") is moot.

We next consider whether the district judge did, as defendant contends, "commit error in preventing defendant from cross-examining the key [g]overnment witness. . .as to his financial motives to testify falsely that he did not substantially transform the glue in Holland." Even if the district judge erred in not permitting the cross-examination, defendant has not been prejudiced. The critical question was whether there had been in Holland a substantial change in the economic value (as distinguished from the physical characteristics) of the glue. It made no difference whether the government witness testified falsely as to the physical (as distinguished from the economic) changes made in the glue, or as to his opinion as to whether those physical changes had constituted a substantial transformation in the physical characteristics or market classification of the glue. The defendant did not claim in the trial court or here that he wished to cross-examine the witness on the vital question as to what economic value was added to the glue by Dutch processing. If he had so claimed, the claim would have been unsound because (except for the cost of rebagging—which was not disputed) this topic had not been covered by the direct examination.

We need not consider whether the district judge erred in denying defendant's motions for a judgment of aquittal on the charge that he falsely stated the dutiable value of the imported glue. In each of its twenty-two counts the indictment charges that the statute there involved had been violated by several acts or means alleged conjunctively: that is, both by false statements as to dutiable value and by false statements as to the country of origin. Since the jury returned a general verdict of guilty on each of the 22 counts, and there was sufficient evidence with respect to the false statements as to the glue's "country of origin," we need not consider whether there was sufficient evidence with respect to the alleged false statements as to the glue's value,[10] or as to other false statements.

Affirmed.

[10]The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged. *Turner* v. *United States,* 396 U.S. 398, 420 (1970); *United States* v. *Richman,* 600 F.2nd 286, 298 (1st Cir. 1979); *United States* v. *Outpost Development Co.,* 552 F.2d 868 (9th Cir. 1977), *cert. den.* 434 U.S. 965 (1977); *United States* v. *Hathaway,* 534 F.2nd 386, 398, *n.*11 (1*st Cir.* 1976); *United States* v. *Barbuto,* 471 F.2d 918, 922, n.3 (1st Cir. 1973); *United States* v. *Lee,* 422 F.2d 1049, 1052 (5th Cir. 1070).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1477

UNITED STATES OF AMERICA,
Appellee,
v.
JOHN E. MURRAY, JR.,
Defendant, Appellant.

JUDGMENT

Entered May 15, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
v.
JOHN MURRAY, JR.

CRIMINAL NO. 78-456-MC

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date September 7, 1979 with counsel Stephen [sic] Brooks, Esq. and entered a plea of not guilty.

There being a verdict of guilty, counts 1 through 22, defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully conspire [sic] with others to defraud the U.S. Customs Service by obstructing and defeating the Customs Service of its lawful government administration of Customs laws and to knowingly and intentionally introduce into the commerce of the United States merchandise by means of fraudulent and false documents; in violation of Title 18, U.S.C., § 371, 542, 551, 2.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years, six (6) months to be served the balance is suspended and defendant is placed on probation for a period of two (2) years. Further ordered to pay a fine in the amount of $20,000.00.

Execution of sentence stayed pending appeal.

/s/ JOHN J. McNAUGHT
United States District Judge

Certified as a true copy on this date September 10, 1979.

/s/ ELIZABETH MURRAY
Deputy Clerk
United States District Court
District of Massachusetts

STATUTES INVOLVED

18 U.S.C. § 2. *Principals*

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

(June 25, 1948, ch 645, § 1, 62 Stat. 684; Oct. 31, 1951, ch 655, § 17b, 65 Stat. 717.)

18 U.S.C. § 371. *Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

(June 25, 1948, ch 645, § 1, 62 Stat. 701.)

18 U.S.C. §542. *Entry of goods by means of false statements.*

"Whoever enters or introduces, or attempts to enter or introduce, in to the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission —

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term 'commerce of the United States'; as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam."

(June 25, 1948, ch 645, § 1, 62 Stat. 715; June 30, 1955, ch 258, § 2(c), 69 Stat. 242.)

18 U.S.C. § 551. *Concealing or destroying invoices or other papers*

"Whoever willfully conceals or destroys any invoice, book, or paper relating to any merchandise imported in to the United States, after an inspection thereof has been demanded by the collector of any collection district; or

Whoever conceals or destroys at any time any such invoice, book, or paper for the purpose of suppressing any evidence of fraud therein contained — —

Shall be fined not more than $5,000 or imprisoned not more than two years, or both."

(June 25, 1948, ch 645, § 1, 62 Stat. 718.)

Tariff Schedules Of The United States 19 *U.S.C.* § 1202
General Headnotes And Rules Of Interpretation

"1. *Tariff Treatment of Imported Articles.* All articles imported into the customs territory of the United States from outside thereof are subject to duty or exempt therefrom as prescribed in general headnote 3.

. . .

3. *Rates of Duty.* The rates of duty in the 'Rates of Duty' columns numbered 1 and 2 of the schedules apply to articles imported into the customs territory of the United States as hereinafter provided in this headnote:

. . .

(e) *Products of Communist Countries.* Notwithstanding any of the foregoing provisions of this headnote, the rates of duty shown in column numbered 2 shall apply to products, whether imported directly or indirectly, of the following countries and areas pursuant to section 401 of the Tariff Classification Act of 1962, to section 231 or 257(e)(2) of the Trade Expansion act of 1962, or to action taken by the President thereunder:

. . .

China (any part of which may be under Communist domination or control)

. . .

(f) *Products of All Other Countries.* Products of all countries not previously mentioned in this headnote imported into the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedule.

. . .

General statistical headnotes:

1. *Statistical Requirements for Imported Articles.*

(a) Persons making customs entry or withdrawal of articles imported into the customs territory of the United States shall complete the entry or withdrawal forms, as provided herein and in regulations issued pursuant to law, to provide for statistical purposes information as follows:

. . .

(vi) the country of origin of the articles expressed in terms of these schedules:

. . .

Schedule 4. — Chemicals And Related Products

Part 6. — Glue, Gelatin, and Related Products

GSP	Item	Stat. Suffix	Articles	Units of Quantity	Rates of Duty 1	Rates of Duty 2
			Part 6, - GLUE, GELATIN, AND RELATED PRODUCTS			
			Part 6 headnote:			
			1. The glue, gelatin, and other products in this part are products of animal or vegetable origin. The classisfication of these products in the provisions of this part is not affected by the addition to such products of any product described in part 1 of this schedule as a deodorant or preservative or to control viscosity.			
			. . .			
455.40	00		Inedible gelatin and animal glue: Valued under 40 cents per pound	Lb.	0.8¢ per lb. + 5% ad val.	2.5¢ per lb. + 20% ad val.
455.42	00		Valued 40 cents or more per pound	Lb.	2¢ per lb. + 6% ad val.	8¢ per lb. + 25% ad val.

19 U.S.C. § 1304. *Marking of imported articles and containers*

"(a) Marking of articles. Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may be by regulations —

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether by printing, stenciling, stamping, branding, labeling, or by any other reasonable method, and a conspicuous place on the article (or container) where the marking shall appear;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article or as to the origin of any other article with which such imported article is usually combined subsequent to importation but before delivery to an ultimate purchaser; and

(3) Authorize the exception of any article from the requirements of marking if —

(A) Such article is incapable of being marked;

(B) Such article cannot be marked prior to shipment to the United States without injury;

(C) Such article cannot be marked prior to shipment to the United States except at an expense economically prohibitive of its importation;

(D) The marking of a container of such article will reasonably indicate the origin of such article;

(E) Such article is a crude substance;

(F) Such article is imported for use by the importer and not intended for sale in its imported or any other form;

(G) Such article is to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any mark contemplated by this section would necessarily be obliterated, destroyed, or permanently concealed;

(H) An ultimate purchaser, by reason of the character of such article or by reason of the circumstances of its importation, must necessarily know the country of origin of such article even though it is not marked to indicate its origin;

(I) Such article was produced more than twenty years prior to its importation into the United States;

(J) Such article is of a class or kind with respect to which the Secretary of the Treasury has given notice by publication in the weekly Treasury Decisions within two years after July 1, 1937, that articles of such class or kind were imported in substantial quantities during the five-year period immediately preceding January 1, 1937, and were not

required during such period to be marked to indicate their origin: Provided, That this subdivision (J) shall not apply after September 1, 1938, to sawed lumber and timbers, telephone, trolley, electric-light and telegraph poles of wood, and bundles of shingles; but the President is authorized to suspend the effectiveness of this proviso if he finds such action required to carry out any trade agreement entered into under the authority of the Act of June 12, 1934 (U.S.C., 1934 edition, title 19, § § 1351-1354) [19 USCS § § 1351 et seq.], as extended; or

(K) Such article cannot be marked after importation except at an expense which is economically prohibitive and the failure to mark the article before importation was not due to any purpose of the importer, produced, seller or shipper to avoid compliance with this section."

(June 17, 1930, c. 497, Title III, Part I, § 304, 46 Stat. 687; June 25, 1938, c. 679, § 3, 52 Stat. 1077; Aug. 8, 1953, c. 397, § 4(c), 67 Stat. 509.)

REGULATION INVOLVED

Customs Regulations, Country of Origin and Marking, Part 134

19 C.F.R. § 134.0 Scope.

"This part sets forth regulations implementing the country of origin marking requirements and exceptions of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), together with certain marking provisions of the Tariff Schedules of the United States (19 U.S.C. 1202). It also contains provisions regarding false or misleading markings as to the country of origin."

• • •

Subpart A — General Provisions

§ 134. 1 Definitions.

"When used in this part, the following terms shall have the meaning indicated:

• •

(b) *Country of origin.* 'Country of origin' means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part."

Supreme Court, U. S.
FILED
AUG 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1962

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN E. MURRAY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner was convicted of filing false Customs declarations and conspiring to do so under an erroneous construction of the term "substantial transformation" in the Customs regulation defining "country of origin."

2. Whether the burden of proof was improperly shifted to petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15) was entered on May 15, 1980. The petition for a writ of certiorari was filed on June 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to defraud the United States Customs Service in its assessment and collection of duties owed on imported merchandise, in violation of 18 U.S.C. 371, and on 21 counts of willfully importing merchandise by means of false and fraudulent documentation, in violation of 18 U.S.C. 542 and 2. Petitioner was sentenced to two years' imprisonment, all but six months of which was suspended in favor of two years' probation, and he was fined $20,000.[1] The court of appeals affirmed (Pet. App. 1-14).

The evidence is summarized in the court of appeals' opinion (Pet. App. 5-6). The government's proof showed that petitioner, the vice-president and executive officer of Nicholson and Company, an importer of animal glue, conspired with Bas Trommelen, the chief operating officer

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[1]John Murray, Sr., petitioner's father and president of the company of which petitioner was vice-president and executive officer, predeceased the return of the indictment but was named therein as an unindicted co-conspirator. Stephen Hopkins, petitioner's nephew and a vice president of the firm who was in charge of its daily operations when petitioner was absent, was acquitted by the jury on all counts. The indictment against Bas Trommelen, petitioner's Dutch contact, was dismissed, and he testified on behalf of the government.

of a Dutch dealer and manufacturer of glue, to import into the United States Chinese glue falsely identified as originating in Holland in order to take advantage of a lower rate of duty. The essence of the scheme was that petitioner's firm purchased Chinese glue through European brokers, who shipped the glue to Holland, where petitioner purported to sell it to Trommelen at prices lower than petitioner had paid his brokers. The glue was then trucked to Trommelen's factory, where it was rebagged and purportedly sold to petitioner for the same price at which he had "sold" it to Trommelen, plus charges for the trucking in Holland, the rebagging at Trommelen's factory, and Trommelen's loss of interest on the money he paid petitioner that petitioner subsequently repaid to him. Thereafter, the glue was shipped to the United States, where petitioner regularly filed Customs declarations identifying Holland as the "country of origin" of the glue.

In response to the government's overwhelming evidence, supplied in large part by the testimony of Trommelen, that nothing was done to the glue at the Dutch plant except for rebagging, petitioner presented evidence that some refining may have taken place, which, he argued, effected a "substantial transformation" in the glue rendering Holland the glue's "country of origin."

ARGUMENT

1. 19 C.F.R. 134.1(b) defines "country of origin" as

> the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

Petitioner contends (Pet. 10) that the court of appeals erroneously held that, for the purpose of determining an article's "country of origin," a change in economic value is the sole criterion of "substantial transformation." He further contends that the court's holding conflicts with other judicial interpretations and with the Customs Service's own regulations. The First Circuit's construction of the term "substantial transformation" is, however, neither erroneous nor novel.

The court of appeals' decision is correct, we submit, because one can hardly conceive of a case in which there would be a sufficient *physical* change in an article to render it "substantially transformed" without there being a concomitant significant change in the article's *economic* value. Indeed, even if such a case can be imagined, the present case, in which the overwhelming evidence revealed no change either in the physical makeup or in the economic value of the glue, is not it. Petitioner's quarrel with the First Circuit's construction of "substantial transformation" thus has nothing to do with this case, in which the government's evidence amply established that the only thing that was done to the glue in Holland was to rebag it.[2]

Moreover, there is no conflict between, on the one hand, the court of appeals' decision in this case and, on the other hand, the decisions of the Court of Customs and Patent Appeals and the Customs Court and the administrative rulings of the Customs Service that petitioner contends establish that physical change is the sole criterion of "substantial transformation." The First

[2]From the complicated arrangements that petitioner made to conceal that China was the ultimate country of origin of the glue, it is clear that he recognized that nothing was being done to the glue in Holland that would satisfy the "substantial transformation" requirement.

Circuit's decision nowhere holds that a "change in economic value is the sole determinant" of an article's country of origin (Pet. 10). Rather, the court below held that "the sub-term 'substantial transformation' means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown" (Pet. App. 10). The court of appeals thus did not ignore the need for physical change.[3] Nor do the Customs rulings upon which petitioner relies hold value enhancement irrelevant. In each of them, something had been done to the goods that cost money and that did enhance their value; the only remaining question was whether what had been done had effected a sufficient physical transformation.[4]

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[3]Prior to construing "substantial" as the modifier of "transformation" and as having an economic meaning, the court of appeals defined "transformation" (Pet. App. 9) as

> a *fundamental* change, not a mere alteration, in the form, appearance, nature, or character of an article. As is indicated by its first syllable, it means a change which carries an article or other object *across* from one class to another class. When used to aid in the determination of the appropriate rate of duty under a tariff schedule it means such a change as to move the article either from one to another of the classes established by official tariff schedules, or from one to another of the classes of goods, wares, and merchandise commonly recognized in the commercial markets where such articles are traded.

[4]*E.g.*, *Parodi Erminio & Co.* v. *United States*, C.D. 485, 6 Cust. Ct. 288, 290 (1941) (holding Spain the "country of origin" of Spanish olive oil that was filtered and repacked in France); T.D. 45611(19), 61 Treas. Dec. 873 (1932) (Chinese silk dyed, printed, and finished in Great Britain held British goods); *A.S. Beck Shoe Corp.* v. *United States*, T.D. 48724, 70 Treas. Dec. 1009, 1011 (Cust. Ct. 1936) (holding "small amount of [fur] trimming" added in Canada to Czechoslavakian shoes did not change country of origin); *United*

In any event, the trial court's instructions placed the question whether there had been a requisite physical transformation of the glue squarely before the jury. The trial court explained the concept of "substantial transformation" as follows (17 Tr. 25-26):

> Your difficulty will be with the words substantial transformation. Perhaps this will be of some help to you. My thought is that a cosmetic difference will not work a substantial transformation. A shave and a haircut would not change a man. A disguise, false mustache, eye glasses, will not work a substantial change: it will work only an inconsequential one.
>
> Now, what happened to that glue in Holland is not my decision; it is yours. If nothing happened, if that is your finding, except a rebagging procedure, then the country of origin was China. If something was done, determine for yourselves whether there was an insubstantial change or a substantial transformation. If it was an insubstantial change, the country of origin remains China. If there was a substantial transformation, then the country of origin of that glue when it entered the United States was Holland.

States v. *Gibson-Thomsen Co., Inc.*, C.A.D. 98, 27 C.C.P.A. 267, 273, (1940) (holding that combining bristles with handles to make brushes was sufficient processing so that "each loses its identity in a tariff sense and becomes an integral part of a new article having a new name, character, and use"); *Midwood Industries, Inc.* v. *United States*, C.D. 4026, 64 Cust. Ct. 499, 507 (1970) (holding rough forgings processed into usable flanges by "cutting, boring, facing, spot-facing, drilling, tapering, threading, bevelling, and heating and compressing" had undergone a "transformation * * * into different articles having a new name, character and use").

> But you will decide what was the actual country of origin. The Judge will not do so for you.[5]

Nowhere in this instruction did the trial judge allude to the need for any enhancement in the economic value of the glue before the jury could find that its "country of origin" had changed from China to Holland. In short, the jury found petitioner guilty under the same standard he now urges in this Court.[6]

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[5]In the court of appeals, petitioner argued that the foregoing instruction was inadequate because it was largely a restatement of the literal language of 19 C.F.R. 134.1(b) that could have permitted the jury to find that the glue had not been substantially transformed even if it found that it had been changed into a new product with a new use. The words "substantial transformation," however, are words of common usage and meaning that require no further explanation or definition. Nevertheless, the trial court added to the plain language of the regulation its own effective language concerning "cosmetic" changes, stating the issue fairly, logically, impartially and in terms that could not have misled the jury. *Elbel* v. *United States*, 364 F. 2d 127, 134 (10th Cir. 1966).

[6]Although not stated as a separate issue in the petition, it is apparently petitioner's position (Pet. 8-9) that the court of appeals erred in upholding the trial court's refusal to permit petitioner to cross-examine Trommelen regarding whether he had exported any of the Chinese glue "purchased" by him from petitioner to European Economic Community nations during 1972-1974, which result petitioner ascribes to the court's assertedly erroneous construction of the term "substantial transformation." At trial, petitioner was permitted to ask Trommelen whether he ever had shipped any Chinese glue to Common-Market countries, to which Trommelen replied "very low percentage" (12 Tr. 39). Thereafter, the district judge refused to permit further inquiry into whether Trommelen had, in fact, sold Chinese glue to Common-Market countries, on the ground that, while such evidence might be relevant, its admission would create confusion and undue delay and it was within his power "to block further inquiry into it" (12 Tr. 40A). The court of appeals upheld the district court's ruling, stating (Pet. App. 13) that "[e]ven if the district judge erred in not permitting the cross-examination, [petitioner was] not * * * prejudiced" because the proffered cross-

2. Petitioner also contends (Pet. 17-19) that the court of appeals erroneously imposed upon him the burden of coming forward with proof of his innocence. Specifically, he points to that court's observation (Pet. App. 12-13) that "there was not sufficient evidence that the glue had undergone a 'substantial transformation' in Holland for the trial judge to have submitted to the jury the question whether it was the country of origin." Regardless of the abstract merit of petitioner's contention, it is wholly insubstantial in the present case. Petitioner was in no way prejudiced by the court of appeals' observation, which was merely dictum, since, as discussed above, the trial court in fact submitted the issue of "substantial transformation" to the jury.[7] Moreover, throughout its charge to the jury, the trial court repeatedly emphasized that the burden of proving petitioner's guilt beyond a reasonable doubt was on the government (17 Tr. 4, 10-14) and that petitioner was under no burden whatsoever to prove his innocence (17 Tr. 13).

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examination did not relate to the issue of change in the glue's economic value.

Whether or not the reasoning employed by the court of appeals was valid, it is clear that it was well within the district court's discretion to exclude further cross-examination regarding a possible violation of Dutch law, where that testimony might have confused or misled the jury and where the witness already had been rigorously and extensively cross-examined by both defense attorneys over a period of two days. Fed. R. Evid. 403. In any event, this largely fact-bound, evidentiary question does not warrant this Court's review.

[7]The complained-of dictum obviated the need for the court of appeals to rule on petitioner's objection to the trial court's charge on "substantial transformation," which, as discussed in note 5, *supra*, is without merit in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

EZRA H. FRIEDMAN
Attorney

AUGUST 1980

DOJ-1980-08